IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 359 of 2002

For Approval and Signature:

HON'BLE MR.JUSTICE J.M.PANCHAL
and
HON'BLE MR.JUSTICE M.H.KADRI

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

GOVINDBHAI INDARBHAI JAT

Versus

STATE OF GUJARAT

Appearance:

1. Criminal Appeal No. 359 of 2002

MS SADHANA SAGAR, advocate for appellant.

MR BD DESAI, ADDL.PUBLIC PROSECUTOR for Respondent.

CORAM : HON'BLE MR.JUSTICE J.M.PANCHAL
and
HON'BLE MR.JUSTICE M.H.KADRI

Date of decision: 05/02/2004

ORAL JUDGEMENT

(Per : HON'BLE MR.JUSTICE J.M.PANCHAL)

Instant appeal filed under Section 374(2) of the Code of Criminal Procedure, 1973, is directed against judgment dated January 24, 2002, rendered by the learned Additional Sessions Judge, Sabarkantha, Camp : Modasa, in Sessions Case No. 95 of 2001, by which the appellant is convicted of the offences punishable under Sections 363, 366 of the Indian Penal Code and sentenced to suffer S.I. for 7 years and fine of Rs.100/- for having committed offence punishable under Section 363 I.P.C. as well as S.I. for 10 years and fine of Rs.100/- for having committed offence punishable under Section 366 I.P.C. In default of payment of total fine of Rs.200/-, the learned Judge has directed the appellant to undergo S.I. for one month. It may be stated that substantive sentences are ordered to run concurrently and benefit of set-off is also given to the appellant.

2. Chandubhai Hirabhai Nayak, who is complainant in the case, is residing at Bore-Falia of village Duma, Taluka : Jambughoda, District : Panchmahals. During the subsistence of his marriage, his wife had given birth to two sons and two daughters, out of whom, Ramilaben was eldest and a daughter named Sumitra was younger to son Raghabhai. Marriage of Ramilaben was arranged with Tulsibhai Bhimjibhai Nayak, who is resident of village Kotivav, Taluka : Halol, and during the subsistence of her marriage, Ramilaben had given birth to two children. In or about December 1999, Chandubhai Nayak was working in the field of Chandreshkumar Parshotambhai Patel, which is located in village Kanal, and was staying there with his family members. The mother-in-law of Chandubhai was ill and, therefore, he in the company of his wife had gone to village Duma to inquire about the health of his mother-in-law, leaving the children in the field of Chandreshkumar Patel. It may be mentioned that the appellant is married to Vasantiben, who is daughter of brother of complainant Chandubhai Nayak. The appellant, in the company of his wife Vasantiben, had come to the field of Chandreshkumar Patel and stayed there for some days. After stay of some days, the appellant had induced Ramilaben and minor Sumitraben to go with him on the pretext that he was taking them to village Duma where their parents had gone to inquire about the health of mother-in-law of the complainant. By deceitful means, the appellant had taken Ramilaben and Sumitraben to Gokul-Mathura. On return, the complainant had found that his two daughters were missing and made inquiry with Chokidar Juvanbhai, who had informed him that the

appellant had taken his daughters to Gokul-Mathura by deceitful means. The complainant had made inquiries at nearby areas, but could not trace his missing daughters. The appellant, in the company of Ramilaben, had returned to village Duma, and on inquiry being made by the complainant, the appellant had informed that Sumitraben was kept at Gokul-Mathura. Therefore, the complainant had lodged complaint on May 9, 2001 with Jambughoda Police Station, which was registered as I. C.R.No.0/2001, for the offences punishable under Sections 363 & 366 of the Indian Penal Code. As the offence had taken place within the jurisdiction of Dhansura Police Station, the complaint was transferred to Dhansura Police Station for necessary investigation where it was numbered as C.R.No. II.27/2001, for the offences punishable under Sections 363 & 366 of the Indian Penal Code. After registration, the complaint was handed over for investigation, to Zensinh Antusinh Thakur, who was then Circle Police Inspector, Bayad. During the course of investigation, the appellant was arrested on May 11, 2001. As the victim i.e. Sumitraben was in Uttar Pradesh, A.S.I. Kalyansinh of Dhansura Police Station was deputed to bring Sumitraben from the place where the appellant had kept her. Accordingly, Sumitraben was brought from Gokul-Mathura. The investigating officer had obtained Birth Certificate of Sumitraben from Duma Gram Panchayat, which indicated that she was below 18 years of age when the incident had taken place. On conclusion of investigation, the appellant was chargesheeted in the Court of learned Judicial Magistrate, First Class, Modasa, of the offences punishable under Sections 363, 366 of the Indian Penal Code. As the offences punishable under Sections 363 & 366 I.P.C. are exclusively triable by a Court of Sessions, the case was committed to Sessions Court, District : Sabarkantha at Himatnagar, where it was numbered as Sessions Case No.95 of 2001. Thereafter the case was made over to learned Additional Sessions Judge, Sabarkantha, Camp at Modasa, for trial.

3. The learned Judge had framed charge at Exh.3 against the appellant of the offences punishable under Sections 363 & 366 I.P.C. The charge was read over and explained to the appellant, who had pleaded not guilty to the same and claimed to be tried. The prosecution had, therefore, examined (i) Chandubhai Hirabhai, PW.1 at Exh.6, (ii) Ramilaben Chandubhai, PW.2 at Exh.8, (iii) Sumitraben Chandubhai, PW.3 at Exh.10, and (iv) Zensinh Antusinh Thakur, PW.4 at Exh.12, to prove its case against the appellant. The prosecution had also produced documentary evidence, such as, complaint of Chandubhai at

Exh.7, panchnama of place of incident at Exh.9 and Birth Certificate of Sumitraben at Exh.13, in support of its case against the appellant.

4. After recording of evidence of prosecution witnesses was over, the learned Judge had explained to the appellant circumstances appearing against him in the evidence of prosecution witnesses and recorded his further statement as required by Section 313 of the Code of Criminal Procedure,1973. In his further statement the appellant had denied the case of the prosecution and claimed that false case was filed against him, but had not examined any one as defence witness.

5. On appreciation of evidence adduced by the prosecution, the learned Judge held that it was proved by the prosecution that minor Sumitraben was taken and/or enticed out of the keeping of Chandubhai Hirabhai, who was her lawful guardian, without his consent and, therefore, the appellant had committed offence of kidnapping punishable under Section 363 I.P.C. It was further held by the learned Judge that the appellant, by deceitful means, had induced Ramilaben and Sumitraben to go from village Kanal, Taluka : Dhansura to Gokul-Mathura and committed offence of abduction as defined in Section 362 I.P.C. Further, it was deduced by the learned Judge that the appellant had kidnapped and/or abducted Ramilaben and minor Sumitraben with intent that Ramilaben could be compelled and/or induced to marry him against her will and, therefore, committed offence punishable under Section 366 I.P.C. In view of abovereferredto conclusions, the learned Judge has convicted the appellant of the offences punishable under Sections 363, 366 of the Indian Penal Code and imposed sentences referred to above by judgment dated January 24, 2002, giving rise to instant appeal.

6. The record of the case shows that the appellant had requested to make available to him free legal aid and, therefore, Mr.Pankaj K.Soni, learned advocate, was appointed to render free legal assistance to the appellant. However, at the time of final hearing of the appeal, Mr.Pankaj K.Soni, learned advocate, had entrusted the appeal to Ms.Sadhana Sagar, learned counsel practising in this Court to argue the same. Accordingly, appointment of Mr.Pankaj K.Soni, learned advocate, which was made to render legal assistance to the appellant, is hereby cancelled, and Ms.Sadhana Sagar, learned counsel, is appointed to render assistance to the appellant.

7. Ms.Sadhana Sagar, learned counsel of the

appellant, contended that the First Information Report was filed after 15 months of occurrence of the incident and, therefore, prosecution case should have been disbelieved in absence of plausible explanation as to why complaint was not filed immediately. It was argued that witness Chandubhai, who is father of two girls, has stated that complaint was filed after the appellant had come to village Duma in the company of Ramilaben; whereas the complaint indicates that it was filed before the appellant had come to village Duma in the company of Ramilaben and, therefore, having regard to material contradictions appearing in the evidence of the complainant, the appellant should be acquitted. What was maintained was that neither the evidence of Ramilaben nor the evidence of Sumitraben shows that Ramilaben was kidnapped or abducted from the custody of her lawful guardian and that she was kidnapped and/or abducted with the intention of compelling her to marry the appellant against her will, or in order that she may be forced or seduced to illicit intercourse and, therefore, conviction of the appellant of the offence punishable under Section 366 I.P.C. is not well-founded. After referring to deposition of Sumitraben, it was urged that a false case was lodged against the appellant because so-called authorized or rightful due known as "dapu" could not be paid by the appellant in respect of relation of the appellant with Ramilaben and, therefore, the appeal should be allowed. According to the learned counsel of the appellant, the learned Judge of the trial Court has failed to appreciate the facts in their true perspective and, therefore, impugned judgment should be set aside.

8. Mr.B.D.Desai, learned counsel of the State Government, contended that the evidence of Chandubhai read with that of Ramilaben and Sumitraben makes it abundantly clear that Sumitraben, who was minor, was taken and/or enticed by the appellant out of the keeping of Chandubhai, who was her lawful guardian, without his consent and, therefore, conviction of the appellant of the offence punishable under Section 363 I.P.C. cannot be regarded as illegal. What was maintained was that the appellant had not only committed offence of abduction as defined in Section 362 I.P.C., but kidnapped and/or abducted two girls with intent that Ramilaben could be compelled or seduced to marry him and, therefore, well-founded conviction of the appellant under Section 366 I.P.C. should be upheld by this Court. According to the learned counsel of the State Government, sufficient explanation is available on record for not filing the complaint promptly and in any view of the matter, as the case of the prosecution stands proved by reliable and

cogent evidence of Ramilaben as well as Sumitraben, the appeal should be dismissed.

9. This Court has undertaken a complete and comprehensive appreciation of vital features of the case and the entire evidence with reference to broad and reasonable probabilities of the case. The evidence of witness Chandubhai Hirabhai, PW.1 Exh.6, indicates that he was lawful guardian of minor Sumitraben. His evidence read with Birth Certificate of Sumitraben establishes that on the date of incident, Sumitraben was minor. As per the say of witness Chandubhai, he in the company of his wife, had gone to village Duma to inquire about the health of his mother-in-law, leaving his children in the house situated in the field. His evidence further shows that after about 15 days, he had come back to village Kanal and had not found his two daughters. As per his say, on making inquiry he had learnt from Juvankaka that the appellant had enticed by deceitful means his two daughters on the pretext that they would be taken to village Duma, but, had in fact taken the girls towards Gokul-Mathura. His evidence further shows that search made by him about the girls had not yielded any result and that after about 13 months, the appellant had come to village Duma with Ramilaben leaving minor Sumitraben at Gokul-Mathura. His evidence further shows that thereafter he had filed complaint and during investigation of the same, Sumitraben was secured. Though this witness has been cross-examined, nothing could be elicited so as to doubt his version as given in examination-in-chief. His evidence stands corroborated in material particulars by his complaint. Further, the evidence of Ramilaben Chandubhai, PW.2 Exh.8, also establishes that she and her younger minor sister Sumitraben were induced on false pretext by the appellant and taken to Gokul-Mathura. What is maintained by her is that she had made attempts to go to her home, but, was prevented by the appellant by administering threats with a knife. This assertion made by witness Ramilaben is not challenged in the cross-examination at all by the defence. It is well settled that when the evidence of wintess is allowed to go unchallenged with regard to a particular point, it may safely be accepted as true. Therefore, assertions made by Ramilaben in her substantive evidence before Court, which have gone unchallenged, will have to be accepted as true. The evidence of Sumitraben shows that the appellant had enticed both the sisters by deceitful means and taken them to Gokul-Mathura where they were illegally confined. According to her, the appellant had placed her in second house of the appellant in the company of someone. This

witness has denied the suggestion made by the defence that Ramilaben was in love with the appellant. It is also denied by the witness that both the sisters were staying in separate houses at Gokul-Mathura and were maintaining themselves by doing labour work. What is asserted by this witness in her cross-examination is that both the sisters were penniless and because of their illiteracy, were not even knowing as to at which place the appellant had brought them. A fair reading of evidence of witness Chandubhai with that of Ramilaben and Sumitraben makes it abundantly clear that the appellant had taken and/or enticed minor Sumitraben out of the keeping of Chandubhai, who was her lawful guardian, without his consent and, therefore, conviction of the appellant of the offence punishable under Section 363 I.P.C. cannot be regarded as illegal. Late filing of the complaint or some contradictions appearing in the evidence of prosecution witnesses would not obliterate the offence of kidnapping committed by the appellant which stands proved beyond pale of doubt by reliable and cogent evidence produced by the prosecution. Under the circumstances, conviction of the appellant of the offence punishable under Section 363 I.P.C. will have to be upheld.

10. There is also no manner of doubt that by deceitful means, the appellant had induced Ramilaben to go from village Kanal to Gokul-Mathura and thereby committed offence punishable under Section 362 I.P.C. However, it is well settled that in relation to charge under Section 366 I.P.C. it must be established that girl was kidnapped and/or abducted with the intention of compelling her to marry any person against her will, or in order that she may be forced or seduced to illicit sexual intercourse. If this ingredient is not established, the charge under Section 366 I.P.C. should fail. By merely finding that the appellant had abducted Ramilaben, charge under Section 366 I.P.C. could not be held to have been proved. It was further necessary to prove that the appellant had abducted Ramilaben for any of the purposes mentioned in Section 366 I.P.C. The evidence adduced by the prosecution does not establish that the appellant had abducted Ramilaben with the intention of compelling her to marry him against her will, or in order that she may be forced or seduced to illicit sexual intercourse. In absence of such evidence, charge against the appellant under Section 366 I.P.C. must fail. Therefore, conviction of the appellant of the offence punishable under Section 366 I.P.C. will have to be set aside.

11. So far as punishment for kidnapping is concerned, this Court finds that the learned Judge of the trial Court has imposed sentence of S.I. for 7 years and fine of Rs.100/-, in default, simple imprisonment on the appellant for having committed offence punishable under Section 363 I.P.C. There is no manner of doubt that the appellant was brother-in-law of minor Sumitraben, and was capable of dominating her and in fact dominated her. The appellant was in fiduciary relationship with minor Sumitraben. The appellant had not only removed minor Sumitraben out of the keeping of her lawful guardian, but, had kept her at Gokul-Mathura for a very long period i.e.for about 1 & 1/2 year, and had not brought her back when he had come to village Duma in the company of Ramilaben. Having regard to the nature of offence committed by the appellant and his relationship with minor victim, this Court is of the opinion that interest of justice would be served if sentence of R.I. for five years and fine of Rs.100/- is imposed on the appellant for having committed offence punishable under Section 363 I.P.C.

For the foregoing reasons, the appeal partly succeeds. Conviction of the appellant recorded by the learned Judge of the offence punishable under Section 366 I.P.C. in Sessions Case No.95 of 2001 vide judgment dated January 24, 2002, is set aside. Conviction of the appellant of the offence punishable under Section 363 I.P.C. is hereby upheld. The appellant is sentenced to suffer R.I. for five years and fine of Rs.100/-, i/d, S.I. for 15 days, for having committed offence punishable under Section 363 I.P.C. The appeal accordingly stands allowed. Muddamal be disposed of in terms of directions given by the learned Judge in the judgment impugned in the appeal.

(J.M.Panchal,J.)

(M.H.Kadri,J.)

(patel)